No. 10,990

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NATHAN NEWMAN, W. O. FILES, R. H. SHAFFER, and BURT CAIN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION OF BURT CAIN FOR A REHEARING After Decision Affirming Judgment of the Trial Court and MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR A REHEARING

SIMEON E. SHEFFEY,
300 Montgomery Street, San Francisco 4,
Attorney for Appellant and Petitioner Burt Cain.

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Topical Index

Table of Authorities Cited

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To the Honorable Clifton Mathews, William Healy and Homer T. Bone, Judges of the Ninth Circuit Court of Appeals:

Appellant Burt Cain, in the above entitled matter, respectfully presents his petition for a rehearing of his appeal in said matter, and for ground of his petition specifies as follows:

I.

THE EVIDENCE IN THIS MATTER CONCLUSIVELY SHOWS THAT BURT CAIN WAS NOT A MEMBER OF THE CONSPIRACY CHARGED IN THE INDICTMENT.

(a) The indictment charges the formation of only one conspiracy and that prior to March 10, 1944.

The indictment in the case at bar charges that the accused,

> "* * * at a time and place to said Grand Jurors unknown, did unlawfully, wilfully, knowingly and feloniously conspire and agree together and with divers other persons to said Grand Jurors unknown, to commit offenses against the laws of the United States, * * * and that *thereafter* and during the existence of said conspiracy and to effect the object thereof, one or more of said defendants as hereinafter mentioned by name, did at the times and places hereinafter set out, and within the jurisdiction of this Court, commit the following acts in furtherance of said conspiracy:" (P. R. 2-3.) (Emphasis added.)

The first overt act in point of time as alleged in the indictment, reads:

> "1. On or about March 10, 1944, the defendants Nathan Newman, Charles Malaby, R. H. Shaffer and Walter O. Files met together at 309 Kearny Street, San Francisco, California;" (P. R. 3.)

Since the indictment alleges that the overt acts occurred after the accused, by the indictment, are alleged to have conspired and agreed, it must be taken as true that the conspiracy charged was entered into prior to the commission of the first overt act in point

of time, to-wit: March 10, 1944. Hence the indictment in effect alleges that the accused conspired and agreed on or before March 10, 1944 and *thereafter* did the overt acts.

We realize that a person may become a part of a conspiracy after it has been formed, but if such is the contention, the indictment should so charge, or the overt acts alleged should so demonstrate. The indictment here involved, after alleging in effect the consummation of the plan or scheme prior to March 10, 1944, then alleges the commission of nine overt acts, in none of which was appellant Cain a participant. Since the evidence shows conclusively that Cain did not know, or had not met any of the other accused, until after March 10, 1944, he could not have been a party to the formation of the original conspiracy charged. Unless, therefore, Cain is accused by the indictment of becoming a member of the conspiracy subsequent to its formation or with the doing of some overt act alleged bringing him into the conspiracy, there is no charge against him except that he conspired and agreed prior to March 10, 1944. He is and was at the trial totally uninformed by the indictment of any other charge which he was to meet.

In *Terry v. U. S.*, 7 Fed. (2d) 28, 29, the court says:

> Ordinarily a charge of conspiracy is not circumscribed or limited by averments as to the time when or the place where the conspiracy was formed. *The charge is limited, however, by the terms of the indictment itself. The indictment here charges but one combination or conspiracy, however divers its objects, and no defendant could be*

> *convicted thereunder unless he was shown to be a member of or party to that conspiracy.* Furthermore, the scope of the conspiracy must be gathered from the testimony, and not from the averments of the indictment. *The latter may limit the scope but cannot extend it.* (Emphasis added.)

In the case at bar, only one conspiracy is charged by the indictment. That conspiracy as to its formation is limited as to time by the allegations of the indictment of the first overt act to some time prior to March 10, 1944. This is the only conspiracy or agreement charged.

(b) The evidence without any question shows that Cain never met nor did he know of the existence of the other accused until after the date fixed in the indictment as subsequent to the consummation of the conspiracy charged, and hence could not have been a member thereof.

The only evidence showing any association of appellant Cain with any of the parties at any time is that of the witnesses Malaby, Cardinelli, and of Cain himself.

Fixing the time of his first meeting with Cain, Malaby testified:

> "The day that I met Cain we did not talk very much, but the next day I came back and we talked about the transaction, and I told Cain that I wished he would give two letters of credentials, to show people that I was representing International Import Company; and he gave me those letters, and they are marked Government's Exhibits 22 and 22-A for Identification, and are

dated March 22, the date I received them." (P. R. 192.)

Cardinelli fixed the time of his meeting Cain as follows:

"Some time in May I came to San Francisco and went to the Palace Hotel where Malaby was. I talked very little to Cain. I said, 'How do you do' when I was introduced." (P. R. 135.)

Cain, himself a witness, testified:

"I first met the Newsmans, Nathan and Morrie, about the middle of March, 1944; and Malaby about March 21, 1944." (P. R. 271.)

This is the only evidence fixing the time Cain met any of the other accused and is undisputed. There was no showing that Cain ever met any of the other accused.

In a conspiracy indictment it is not necessary that the exact date of the formation of the conspiracy be alleged. However it is necessary that the time of the formation be alleged to be prior to the doing of the overt acts. This rule the indictment in the case at bar recognizes by fixing the dates of the overt acts and by alleging that they were done after the formation of the conspiracy.

Bradford v. United States, 152 Fed. 616, 619.

"This is not a case where the date of the formation or the beginning of the conspiracy must be plead with exact accuracy. It need not be proven that the conspiracy was formed and begun at the date given in the indictment. *The es-*

sential point is that the conspiracy existed before the date of the overt act alleged, and continued to exist at the time the overt act was committed." (Emphasis added.)

What must be proven must be alleged, hence the allegation, in the indictment at bar, that the conspiracy was formed before the overt acts were done, fixes the time. That the overt acts may be referred to for fixing time, see *Fisher v. United States,* 2 Fed. (2d) 843, 845.

It is no answer to this contention to say that a conspiracy as to time need not be proved exactly as charged in the indictment or that a conspiracy is sufficiently proved if it is shown to have been in existence prior to the time of the commission of any overt act alleged and proved. The supposed answer is subject to the rule that a variance between pleading and proof becomes material when the rights of the accused are prejudiced thereby. In the case at bar let us suppose that the conspiracy part of the offense was not concluded until just prior to the time the last overt act was done. Then all the evidence admitted relating to the doing of any one or all of the previous overt acts alleged, was erroneously admitted and the rights of the accused, especially Cain, were prejudiced thereby. That evidence of overt acts done prior to the formation of a conspiracy is inadmissible, see

Jay v. United States, 35 Fed. (2d) 553;
Wilson v. United States, 109 Fed. (2d) 895.

A person cannot be convicted on *the* overt act who has not joined in the previous conspiracy.

> *United States v. Hirsch* (100 U. S. 33), 25 L. Ed. 539, 540.

If Cain is to be convicted of conspiring and agreeing to do an unlawful act, the fact and manner of his agreeing must be distinctly and directly alleged.

> *Hammer v. United States,* 134 Fed. (2d) 592, 595.

Evidence of an unalleged agreement is incompetent. *Asgill v. United States,* 60 Fed. (2d) 780, 785. Having disproved the conspiracy charged in the indictment, nothing remained therein upon which Cain could be legally convicted. The proper method of charging a subsequent adherence to a conspiracy already formed, is indicated in *Norton v. United States,* 295 Fed. 136, 137.

As said by the Court in *Terry v. United States, supra,* p. 30:

> "* * * a conspiracy is not an omnibus charge, under which you can prove anything and everything, and convict of the sins of a lifetime."

Without an allegation in the indictment that Appellant Cain became a member of the conspiracy subsequent to the time of its formation and without some allegation as to how he did so or without a recital therein of an overt act which fixed Cain as a participant in said conspiracy, the indictment at most merely charged that Cain conspired with the other defendants, on or before March 10, 1944. The evidence re-

futes this charge. However, it was the only charge which the indictment informed Cain that he was to meet at the trial and against which he was called upon to defend himself.

Since the gist of a conspiracy is the conspiracy itself, the overt acts alleged must post-date the formation of the plan or scheme, or, if the conspiracy is a continuing one, it must be alleged or shown in the indictment when and how the particular accused became subsequently a member of the conspiracy.

As to the relation in time of the charge of conspiracy and the doing of overt acts, the Court said, in *United States v. Miller,* 36 Fed. 890, 892:

> "In neither count is there any averment of time or place of the alleged 'overt' act, which would seem to be necessary to identify the act, and to show the court and jury that the same post-dated the conspiracy, and was in fact an act, not a part of the conspiracy but done to effect its object."

To the same effect is *United States v. Richards,* 149 Fed. 443, 452, where the Court, in charging the jury, said:

> "I have before stated that the overt act must be one independent of the conspiracy or agreement. This is true. Yet the overt act, the manner and the circumstances under which it is done, may be considered, in connection with other evidence in the case, as one circumstance in determining whether or not there was the conspiracy or agreement charged. *But it must be established*

that the conspiracy or agreement which is charged to have existed, and which is the gist of the action in this case, had been formed before and was existing at the time of committing the overt act." (Emphasis added.)

Dahly v. United States, 50 Fed. (2d) 37, 42:

"A conspiracy under Section 37 Cr. Code (18 USCA §§88) is an agreement by two or more persons to commit an offense against the United States. The gist of the offense is the conspiracy; that is, the agreement between two or more persons to effect the unlawful end; but before the offense is a completed one, some one or more of the parties to the conspiracy must do some act to effect the object of the conspiracy. Such act is called an overt act.

"Two things, therefore, must be proved before a conviction can properly be had: (1) The conspiracy or agreement to commit the offense named against the United States; (2) an overt act or acts done in furtherance of the conspiracy. The overt act or acts need not be criminal per se; but an overt act must be one independent of the conspiracy or agreement. It must not be one of a series of acts constituting the agreement or conspiracy together, *but it must be a subsequent independent act following the complete agreement or conspiracy, and done to carry into effect the object of the conspiracy.*

"The overt act or acts, the manner and circumstances under which they are done, may be considered in connection with other evidence in the case as circumstances in determining whether or

> not there was formed the conspiracy or agreement charged; *but it must be established that the conspiracy or agreement which is charged to have existed and which is the gist of the offense had been formed before and was existing at the time of the commission of the overt act or acts.*" (Emphasis added.)

As applied to Appellant Cain in the case at bar, all the overt acts are alleged to have occurred after the conspiracy agreement was entered into. Thus, on March 10, 1944, the conspiracy had been accomplished and thereafter nothing remained to be done but the effecting its purpose. Cain disproved his part in any such agreement. There is no other, further or subsequent agreeing or conspiring charged. The overt acts, even if they could assist in this regard, are totally silent as to any agreeing or conspiring on Cain's part. Hence, having affirmatively disproved that he was a party to any agreement or conspiracy made before March 10, 1944, and no other conspiring or agreeing being charged in the indictment, Cain was entitled to a dismissal of the charge against him.

We believe the Court laid down rules particularly apropos to the case at bar in the case of *United States v. Biggs,* 157 Fed. 264, 272:

> "But it is insisted that the closing part of the indictment, found after the overt acts are set out, shows clearly that but one conspiracy is charged, and that that was a continuing conspiracy from August 25, 1899, to the date of the presenting of the indictment. And this leads us to another objection raised.

"Assuming that the indictment does not charge several conspiracies, as above indicated, but that it was one conspiracy continuous from its formation on August 25, 1899, to the presenting of the indictment, we come to consider the plea of the statute of limitations. The first overt act in furtherance of the conspiracy is charged as of date August 25, 1899, and *it is insisted by the defendants that, if the indictment charges but the one conspiracy, on the commission of that overt act prosecution could have then been had, and that therefore the statute of limitations began to run as of that date. Against this it is answered that under the doctrine in the Ware Case, supra, every overt act, with 'conscious participation' by the defendants in the unlawful combination, works a renewal of the conspiracy. This may be conceded to be the clear holding in that case; but it is evident that that conclusion was there reached on a consideration of the rules applicable to evidence and the particular proof then in hand, which is a very different thing from the rules applicable to pleading, in charging a criminal offense.* In that case the indictment charged the formation of a conspiracy within the statute, and, if the proof in such a case sustains the charge, it would be no defense for the defendant to show that a like conspiracy had been theretofore formed and overt acts done thereunder prior to the bar. Taking, therefore, the closing part of the indictment as a part of the charge, it appears that the conspiracy charged against the defendants and all of the overt acts charged thereunder, save the last one, were at a time far more than three years before the filing of the indictment." (Emphasis added.)

In the case at bar the offense charged was completed with the performance of the first overt act alleged. There is no allegation in the indictment of any further agreeing or conspiring after this date. The overt acts do not show this. There is only the weakest form of allegation from which the inference may be drawn that the conspiracy continued beyond the date of the first overt act in this; the indictment alleges: "and that thereafter and during the existence of said conspiracy," etc. (P. R. 2) the overt acts were done on various dates. But repeating again the language of the *Biggs* case, *supra* (273):

> "Against this it is answered that under the doctrine in the Ware Case, *supra,* every overt act, 'conscious-participation' by the defendants in the unlawful combination, works a renewal of the conspiracy. This may be conceded to be the clear holding in that case; but it is evident that that conclusion was there reached on a consideration of the rules applicable to evidence and the particular proof then in hand, which is a very different thing from the rules applicable to pleading, in charging a criminal offense."

We repeat the foregoing language to emphasize that *it is a matter of pleading we are dealing with here, and not a matter of evidence.* There is no charge whatsoever in the indictment that Cain conspired or agreed, except that he conspired and agreed prior to March 10, 1944, and this he totally disproved.

In *Frankfort Distilleries v. United States,* 144 Fed. (2d) 824, 832, the Court said:

> "The several counts each charge only a single crime—the conspiracy. The conspiracy as laid includes several acts and means of making it effective, but the crime is the entering into the combination. That is the unit, however varied the means and procedure of effectuating it. The several acts and means of making the conspiracy effective are related acts which enter into the crime, but still the single crime is that of combining and conspiring together to restrain interstate trade and commerce, or to monopolize such trade and commerce. Duplicity in an indictment means the charging of two or more separate and distinct offenses in one count, not the charging of a single offense into which several related acts enter as ways and means of accomplishing the purpose. Braverman v. United States, 317 U.S. 49, 63 S.Ct. 99, 87 L.Ed. 23; United States v. New York Great Atlantic & Pacific Tea Co., supra."

The selling and delivering and the offering to sell and deliver by which the accused in the indictment are alleged to have conspired and agreed, are in like manner alleged to have occurred prior to March 10, 1944, and hence Appellant Cain could not have been a party thereto. Therefore, since the indictment charges only one conspiracy, continuing or not, and the date of the formation thereof being fixed as prior to the date of the doing of the first overt act and the evidence without question showing that Cain did not know and had never heard of any of the other accused until subsequent to the doing of the first overt act, the evidence proves that he could not have been a party to the conspiracy charged.

II.

IF THE CHARGE IS THAT THE CONSPIRACY WAS FORMED BY OTHERS OF THE ACCUSED AND THAT CAIN THEREAFTER BECAME A MEMBER THEREOF, THE INDICTMENT SHOULD SO ALLEGE. CAIN WAS NOT INFORMED OF ANY CHARGE AGAINST HIM EXCEPT AS CONTAINED IN THE INDICTMENT AND COULD NOT PREPARE HIS DEFENSE EXCEPT AS CHARGED.

Cain at the trial was prepared to meet, did meet and disprove that he was a member of, or entered into any agreement of, conspiracy prior to March 10, 1944, as laid in the indictment. He was not charged with participating in or with having any knowledge of the overt acts alleged, and the evidence did not prove any such connection. At the trial of the matter it was contended by the prosecution that Cain, after the conspiracy had been formed and subsequent to March 10, 1944, had adhered to and by agreement and acts, had become a member of, the conspiracy. This the indictment does not charge and without such charge Cain was not informed of the charge he was to meet. Under these circumstances, Cain, knowing full well that he could disprove his entry into any conspiracy as laid in the indictment, waived his right to trial by jury. Furthermore, a judgment of conviction or acquittal of a conspiracy formed prior to March 10, 1944, could not be pleaded in bar of a charge of conspiracy formed subsequent to such date. We, of course, know the rule that one may join a conspiracy after it is formed, and in so doing his act of joining relates back to the inception of the conspiracy, but this is a matter of evidence. *What we are dealing with*

here is a matter of pleading. In order for the evidence to be admissible, it must be appropriate to the pleading. The pleading limits the scope of the evidence admissible and not vice versa. To make evidence admissible that Cain became a member of the conspiracy after it was formed, the indictment must so allege. Without such allegation, Cain was entirely uninformed of the charge he was called upon at the trial to meet. When Cain met and disproved that he had conspired prior to March 10, 1944, he had met and disproved every charge against him contained in the indictment. In *United States v. Green,* 136 Fed. 618, 656, the Court said:

> "In a criminal indictment charging a conspiracy to defraud the United States, the defendants are entitled to be informed in the indictment of the acts they are charged with having agreed to do, by which the fraud is to be perpetrated or consummated. Pettibone v. United States, 148 U.S. 197-202, 13 Supt. Ct. 542, 37 L. Ed. 419; United States v. Hess, 124 U.S. 483-486, 8 Sup. Ct. 571, 31 L. Ed. 516; United States v. Britton, 108 U.S. 199, 2 Sup. Ct. 531, 27 L. Ed. 698. *The defendants in such an indictment, aside from meeting the overt acts, are required to be prepared to defend themselves against proof that they agreed to do the acts charged as having been agreed to be done. They are not to be called upon—they are not required to be prepared—to show that they did not make or enter into an agreement, the terms of which are not fairly stated or set forth in the indictment.* It is not sufficient to charge the crime in the words of the statute, or to state an agreement to do acts which, if done, would not operate

> to defraud the United States. United States v. Cruickshank et al., 92 U. S. 558, 559, 23 L. Ed. 588, and cases there cited." (Emphasis added.)

If it was the contention that Cain became a member of the conspiracy after it was formed, such charge, if made in the indictment, would have informed him of what he was to meet.

The Court said in *United States v. Atlanta Journal Co.,* 185 Fed. 656, 662:

> "These are the only instances under the acts of Congress in which a publication having the other requisites and admitted to the second class would violate the law by mailing under the second-class rate. *In a case like this, charging a crime under section 5440 of the Revised Statutes (page 3676, U. S. Comp. St. 1901, it should not be necessary to gather the case from mere inference, but it should charge with reasonable certainty that which would constitute an offense under the law.* Many authorities might be cited in support of this." (Emphasis added.)

Likewise the rule is announced in *Smith v. United States,* 157 Fed. 721, 725:

> "A fundamental and well-established rule necessary to be observed in all cases is that all the essential elements of the offense must be averred in the indictment, and that, too, with sufficient clearness and particularity to enable the accused to understand the nature of the charge against him, to intelligently prepare to meet it, and to plead the result, whether conviction or acquittal, as his protection against another prosecution for the same offense."

In *United States v. Grossman,* 55 Fed. (2d) 408, the Court held that where one was charged with having become a member of a conspiracy after it had been formed, he was entitled to a bill of particulars showing what his acts were that tended to effect the purpose of the conspiracy and how they did so, saying at 411:

> "In view of the admitted fact that the defendant Grossman did not become chief of police of the city of Long Beach until January 1, 1930, and the conspiracy deals with his acts as chief of police, and that the indictment makes use of the words 'protection' and 'interference', which seems to be a conclusion, and that the paragraph containing these words is ambiguous, to say the least, if not containing a greater defect, the motion for a bill of particulars will be granted.
>
> "The government will not be disclosing its evidence by filing a bill of particulars setting forth what the 'interference' and 'protection' of the defendant Grossman consisted of, and the approximate time thereof."

This fundamental rule of law requires no further citation of authority to establish it. The indictment charging that Cain conspired and agreed prior to March 10, 1944, did not inform him that he was to meet a charge of conspiring or adhering to a previously formed conspiracy subsequent to this date. He is entitled to stand upon the indictment as to when and how he is charged to have become a member of the conspiracy.

III.

WHEN THE JURISDICTION OF THE COURT TO TRY A CONSPIRACY CHARGE DEPENDS UPON THE ALLEGATIONS OF THE PLACE WHERE THE OVERT ACTS WERE COMMITTED, FACTS SHOWING THE RELEVANCY OR MANNER IN WHICH THE OVERT ACTS FURTHERED OR TENDED TO FURTHER THE OBJECT OF THE CONSPIRACY MUST BE ALLEGED IN THE INDICTMENT. MERE CONCLUSIONS OF THE PLEADER WILL NOT SUFFICE.

In considering the sufficiency of an indictment of conspiracy in relation to showing the relevancy of the overt acts, we must distinguish those cases where under the particular law there is no necessity of alleging overt acts, those cases in which the overt acts alleged are in themselves unlawful, and those cases where the connection between the conspiracy and the overt act is inherent from the act itself, e.g., renting a post office box in a charge of conspiracy to use the mails to defraud. The case at bar falls within none of the foregoing classifications. All of the overt acts here alleged are in and of themselves innocent acts. There is nothing inherent in any of them that shows any connection with the conspiracy charged. Therefore, the indictment, by appropriate allegations, must show the relevancy of the acts alleged. It is true that the indictment here alleges "to effect the object thereof" and "in furtherance of said conspiracy" the acts were done. We believe the indictment is subject to the defect pointed out in *United States v. Dowling,* 278 Fed. 630, 639, where the court said:

> "It might be that, if it was charged that they adjourned to go their several ways to carry out and effect the object of the conspiracy, or with

intent of effecting the object, this would be sufficient; but, *unless it was charged that the act was committed for the purpose or with the intent of effecting the object of the conspiracy, it would be clearly insufficient, even under the Collier Case. This would be so, if for no other reason than because of the presumption of innocence which would be implied in the absence of allegations of purpose or intent that the person acting as alleged in the overt acts did so innocently, and hence on his own account only, and not to effect the object of the conspiracy. All intendments are against the pleader. No inference of intent or purpose will be indulged in to supply the omission of this essential element of an offense under section 37 of the Criminal Code.*" (Emphasis added.)

In *Tillinghast v. Richards,* 225 Fed. 226, 231, the Court says:

"Jurisdiction may be founded upon an overt act, as the hiring of a post office box in pursuance of a plan (of using the mail to defraud), for there is an apparent connection between act and offense. See Brown v. Elliott, 225 U.S. 392, 32 Sup. Ct. 812, 56 L.Ed. 1136. It would be quite another thing to allege, for example, in this case, the hiring of a post office box as an overt act, for this would be in no apparent connection with the alleged plan. *A pleader should not be permitted to allege isolated acts, and the court required upon his mere allegation that they were done pursuant to the conspiracy, and without the slightest idea whether this is true or not, to take the pleader's word, instead of himself seeing*

> *whether the act alleged was relevant or not.* In the present case, for example, it seems that the pleader is mistaken in his notion that the purchase of palm oil could possibly be an act to effect the unlawful removal of oleomargarine containing it from the factory at Providence. I am quite convinced, also, that the use of this palm oil in the manufacture of oleomargarine at Providence could not, in any way, effect the object of unlawfully removing it. There are instances where the impossibility of the allegation is apparent on the face; but the rule, I think, is not altered if the act alleged is one which may or may not be an act to effect the object. A charge of crime must not be equivocal. *The court must find it on the facts alleged, and not in the pleader's conclusions as to logical connection of facts."* (Emphasis added.)

The indictment in the case at bar is contrary to every principle announced by the foregoing authority. Nowhere in the indictment is there any allegation of the manner in which the overt acts alleged furthered or tended to accomplish the objects of a conspiracy. All that is alleged in this regard is that the defendants, to effect the object of a conspiracy and in furtherance thereof, committed the overt acts alleged. This is only a conclusion of the pleader.

In *Tillinghast v. Richards, supra,* at p. 230, the Court says:

> "Since the decisions in Hyde v. United States, and in Brown v. Elliott, 225 U.S. 392, 32 Sup. Ct. 812, 56 L. Ed. 1136, however, I am of the opinion that U.S. v. Donau, which was decided when

the law was understood to be that the overt act was not a part of the offense and not a jurisdictional fact, and cases which have followed it, are of doubtful authority. Where the overt acts and the conspiracy are in the same place, local jurisdiction may rest entirely upon the conspiracy. *Where, however, the jurisdiction of the court depends solely upon the alleged overt act* (see Brown v. Elliott, 225 U.S. 392, 32 Sup. Ct. 812, 56 L. Ed. 1136), *it must be alleged with all the definiteness and certainty of any other jurisdictional fact; and certainly it should be made to appear by the allegations of the indictment that there was a connection between the act done and the plan.* If a rule of pleading is adopted which permits a constructive presence to be alleged in the same terms as an actual presence, and this upon the foundation of a bare allegation that an act apparently isolated was done in pursuance of a plan with which it has no apparent connection, then the prima facie effect of an indictment as evidence of probable cause is entirely destroyed." (Emphasis added.)

In *Boykin v. United States,* 11 Fed. (2d) 484, 485, the Court said:

"We are of opinion that the indictment is fatally defective, and that the demurrers should have been sustained. The offense here sought to be charged is made up of an act and an intent. The criminal intent is made to relate to matters which the statute wisely describes in the most general terms, so as to include every breach of duty which an official may be influenced or induced to commit. It is to be observed that the

language used in the indictment is as general as is the language of the statute. Where a statute is general, it is not sufficient merely to follow its language in an indictment, but the indictment must allege the specific offense coming under the general description of the statute, in order that the accused may enjoy the right, secured by the Sixth Amendment, 'to be informed of the nature and cause of the accusation' against him. United States v. Cruickshank, 92 U.S. 542, 23 L.Ed. 588; United States v. Hess, 8 S.Ct. 571, 124 U.S. 483, 31 L.Ed. 516; Foster v. United States, 253 F. 481, 165 C.C.A. 193; Miller v. United States (C.C.A.), 288 F. 817; Bishop's New Criminal Procedure, §§ 568, 569, 570. In this case the testimony tended to show that it was the intent of defendants to influence and induce Gonzaullas not to investigate and not to report them to the district attorney for illegal sales of liquor. Gonzaullas, according to his testimony, accepted the bribe, but only for the purpose of making a case against the defendants.

"The representatives of the government knew the acts which they would rely on to show a corrupt intent. But it is impossible, as it appears to us, to ascertain from the indictment what acts would be relied on at the trial. Nothing but conclusions are stated. No facts are alleged from which it could be determined whether the proceedings pending or to be brought before the prohibition agent related or would relate to violations of the National Prohibition Act, or what the fraud charged consisted of, or what acts it was the intention of the defendants to induce the prohibition agent to omit to do. The trial court

> was wholly without information as to the facts relied on, and could not possibly have determined whether the matters complained of were such as could affect the official duties of the prohibition agent."

A good discussion of the subject of venue is to be found in *United States v. Safeway Stores,* 51 Fed. Supp. 448.

In the case at bar the allegations of the overt acts are all typical. The first overt act is alleged:

> "1. On or about March 10, 1944, the defendants Nathan Newman, Charles Malaby, R. H. Shaffer and Walter O. Files met together at 309 Kearney Street, San Francisco, California;" (P. R. 3.)

Certainly, there is nothing inherently wrong in the act of Newman, Malaby, Shaffer and Files meeting together. How, or in what manner this act of meeting together effected or tended to effect the object of the conspiracy the indictment is entirely silent. It is only the conclusion of the pleader that such act effected or tended to effect the object of the conspiracy. If we leave out of the indictment the words "to effect the object thereof" and "in furtherance of", the indictment would read:

> "and that thereafter and during the existence of said conspiracy one or more of said defendants * * * did * * * commit the following acts:"

In construing the sufficiency of the indictment, the conclusions of the pleader add nothing thereto. *Fuller v. United States,* 114 Fed. (2d) 698, 699. Hence, elimi-

nating the conclusions of the pleader, no relation whatsoever is shown between the conspiracy charged and the acts alleged. A somewhat similar question as here involved was involved in the case of *United States v. Ault,* 263 Fed. 800, wherein it was held that an indictment was insufficient where the overt acts alleged did not show in themselves that such acts effected the object of the conspiracy.

Each of the nine overt acts alleged, standing by themselves, are innocent acts. There is nothing inherent in any of the acts that show any connection with the conspiracy charged. The only thing in the indictment that tends to show that they were done in furtherance of the conspiracy charged is the allegation, by way of conclusion of the pleader, that they were done "to effect the object thereof" (P. R. 2) and "in furtherance of said conspiracy." (P. R. 3.) This manner of alleging is not sufficient, according to the foregoing authorities. This rule is of particular importance to Cain, since he knew he could and did disprove the conspiracy charged, he was given a further sense of security by the setting forth of overt acts innocent in themselves with no showing of any connection with the conspiracy charged.

The statements of the Court in *Tillinghast v. Richards,* supra, as to jurisdiction are particularly appropriate to the case at bar. In the case at bar the jurisdiction of the Court is not fixed by the charge of conspiracy, but attempted to be fixed by alleging that the overt acts were done within the trial Court's

jurisdiction. Here the jurisdiction of the trial Court depended solely upon the alleged overt acts, therefore it should have been made to appear with definiteness and certainty by the allegations of the indictment that there was a connection between the overt acts done and the plan charged.

Under Amendment VI of the Constitution, the accused is entitled to be tried in the state and district wherein the crime shall have been committed. Hence the venue is the same as jurisdiction. In *People v. Wakao,* 33 Cal. App. 454, 456, the Court said:

> "Venue means place of trial and place of trial means the jurisdiction of the Court which, in the present case, is limited by the constitution to one of the two counties mentioned therein."

At page 457, this Court said further:

> "In *People v. Terrill,* 127 Cal. 99, 100, (59 Pac. 836, 837), the Court said: 'It is an elementary principle of criminal law that the indictment or information must state that a crime has been committed, either by direct, positive averment in the language of the statute, or its equivalent, or by stating facts which show that such crime has been committed. In no case will the indictment be aided by imagination or presumption. The presumptions are all in favor of innocence and if facts stated may or may not constitute a crime the presumption is that no crime is charged.' The rule was much discussed in *People v. Schmitz,* 7 Cal. App. 330, 365, (15 L.R.A. (N.S.) 717, 94 Pac. 407, 419), and see opinion of Supreme Court on petition for hearing in that

> Court. *Not only is it essential that a crime be charged, but it must also appear that the Court has jurisdiction to hear and determine the case.*" (Emphasis added.)

In the case at bar, without a direct and positive allegation of fact showing a relevancy between the overt acts alleged and the conspiracy charged, it does not appear that the Court had jurisdiction to hear and determine the case.

The Court said in *Bratton v. United States,* 73 Fed. (2d) 795, 798:

> "Furthermore, no venue of any act of concealment is alleged. As far as the failure to disclose to federal authority is concerned, the venue is the place where the report should have been made. Rumely v. McCarthy, 250 U. S. 283, 39 S. Ct. 483, 63 L. Ed. 983; United States v. Lombardo, 241 U. S. 73, 36 S. Ct. 508, 60 L. Ed. 897; United States v. Commerford (C.C.A. 2) 64 F. (2d) 28. Even that is only inferentially alleged, as it requires the defendant to know that the officers to whom the disclosure should be made have their offices in the district where the indictment was returned. If one could infer an affirmative act of concealment from the naked allegation of this indictment, or from the bribery, nowhere does the indictment intimate that such act took place in this district; it might well have been that the act of concealment took place a few miles away in the Eastern or Northern District. While failure to allege venue directly is not a jurisdictional defect in the sense that it will support a collateral attack (Knewel v. Egan, 268 U. S. 442,

45 S. Ct. 522, 69 L. Ed. 1036; United States v. Pridgeon, 153 U. S. 59, 14 S. Ct. 746, 38 L. Ed. 631), yet the federal cases, and some from the state Courts, hold an indictment failing to allege venue is demurrable. Patterson v. United States, (C.C.A. 6) 222 F. 599, 626; United States v. Christopherson (D. C., E. D. Mo.) 261 F. 225; United States v. Jenks (D. C. E. D. Pa.) 258 F. 763; United States v. Marx (D. C. E. D. Va.) 122 F. 964; Hughes on Fed. Prac. §7035. *In addition, a failure to state, with some degree of certainty, where the alleged offense took place renders the indictment open to the objection that it does not fairly apprise the accused of the facts charged, and denies him the right to a plea of former conviction or acquittal if later charged with the same offense.* Skelley v. United States (C.C.A. 10) 37 F. (2d) 503. *When it is recalled that the Sixth Amendment gives the accused a right to trial in the 'district wherein the crime shall have been committed,' a failure to allege that the crime was committed in the district is inexcusable.*

The government challenges our right to notice the fatal defects in the indictment because the record discloses no formal exception to the order of the Court overruling the demurrer to the indictment. We are cited to cases which hold that an exception is necessary to test the correctness of rulings on questions not arising on the record. If the point were well taken, this case would fall under the rule that Courts may notice plain and grievous errors which have deflected the course of justice. Williams v. United States (C.C.A. 10) 66 F. (2d) 868." (Emphasis added.)

See *Brightman v. United States,* 7 Fed. (2d) 532, 534:

"The presumption of the statute alone, however, was not sufficient for conviction. Before the defendant could properly be convicted, it was necessary for the government to go further and prove that the venue was the Western district of Oklahoma. This was a prerequisite to a conviction, and the foundation of this prerequisite is contained in the Sixth Amendment to the Constitution of the United States, which provides: 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.' Wharton Crim. Ev. (10th Ed.) § 106a; Vernon v. United States, 146 F. 121, 76 C.C.A. 547 (this Court); Moran v. United States (C.C.A.) 264 F. 768; Underwood v. United States, (C.C.A.) 267 F. 412; Tuckerman v. United States (C.C.A.) 291 F. 958, 967.

In the Vernon Case, this Court said: 'Under this constitutional provision, the venue is as material as any other allegation in the indictment, and the burden to prove it rests upon the government.'

It might be claimed that the prima facie evidence arising under the statute renders proof of the venue unnecessary. We do not think that the presumption or prima facie evidence of the statute includes the venue. The wording of the statute does not indicate such an intention on the part of Congress. The statute provides that

'the absence of appropriate tax-paid stamps * * * shall be prima facie evidence of a violation of this section by the person in whose possession same may be found.'

In the instant case, the violation of the section was the unlawful purchase alleged. *The venue was not an element of the offense. It was an independent matter, necessary, however, to be alleged and proven.*" (Emphasis added.)

See *United States v. Great Western Sugar Co.*, 39 Fed. (2d) 152, 154:

"The next pleas are to the jurisdiction, and must be sustained upon substantially the same ground. It is not claimed that the conspiracy was formed in Nebraska, nor is it localized here by any specific allegation, except that some of the beets were taken and paid for here. *I am satisfied those acts neither furthered the conspiracy nor manifested it in existence or operation, and therefore the conspiracy is not shown to have come within the territorial jurisdiction of this Court.*" (Emphasis added.)

A failure to accord an accused the rights given him under said Sixth Amendment, goes to the Court's jurisdiction.

Ex parte Bain (121 U. S. 1), 30 L. Ed. 849.

Jurisdiction cannot be waived.

United States v. Norris (281 U. S. 619), 74 L. Ed. 1076.

IV.

SINCE CAIN WAS NOT SHOWN TO HAVE BEEN A MEMBER OF THE CONSPIRACY, AS LAID IN THE INDICTMENT, THE ADMISSION INTO EVIDENCE OF STATEMENTS MADE NOT IN HIS PRESENCE WAS ERROR AND SUCH STATEMENTS WERE HEARSAY.

The Court said, in *Tingle v. United States,* 38 Fed. (2d) 573, 575:

> "Mere irregularity in the order of proof is generally permissible within the sound discretion of the Court, and will not constitute reversible error provided the record ultimately contains evidence which renders competent and material that which has thus been admitted out of order. *But in conspiracy cases, the unlawful combination, confederacy and agreement between two or more persons, that is, the conspiracy itself, is the gist of the action, and is the corpus delicti charged. It is, therefore, primarily essential to establish the existence of a confederation or agreement between two or more persons before a conviction for conspiracy to commit an offense against the United States can be sustained.* This statement requires no citation of authorities." (Emphasis added.)

The rule of the foregoing case requires no extended discussion. The discussion of the preceding points has demonstrated that Cain disproved any connection with conspiracy charged in the indictment. He was therefore convicted on evidence which, as to him, was clearly inadmissible.

SUMMARY.

We submit that the foregoing points and authorities conclusively demonstrate that: (1) not only did the prosecution fail to prove that Cain was a member of the conspiracy charged but the evidence conclusively proved that he was not. The conspiracy charged in the indictment is alleged to have been formed prior to March 10, 1944. At or prior to this date Cain had never met and did not know any of the other accused. (2) That Cain was convicted of an offense not charged in the indictment and of which he knew nothing until the course of the trial and hence was in no way prepared to defend himself. (3) That the Court was without jurisdiction either to hear and determine the conspiracy charged in the indictment or that of which Cain was convicted, and (4) Cain was convicted of something not charged in the indictment and on hearsay evidence.

We respectfully submit that the petition for a rehearing herein should be granted and that the judgment of conviction of Appellant Cain should be reversed.

Dated, San Francisco, California,
June 28, 1946.

Respectfully submitted,
SIMEON E. SHEFFEY,
Attorney for Appellant
and Petitioner Burt Cain.

Certificate of Counsel.

I hereby certify that I am counsel for Burt Cain, appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
June 28, 1946.

Simeon E. Sheffey,
Of Counsel for Appellant and Petitioner Burt Cain.